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In the Supreme Court of the United States

OCTOBER TERM, 1960.

No. 236

STATE OF OHIO,
Plaintiff-Appellee,

vs.

DOLLREE MAPP, a.k.a. DOLLY MAPP,
Defendant-Appellant.

APPEAL FROM SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

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APPEAL FROM SUPREME COURT OF OHIO.

JURISDICTIONAL STATEMENT.

REPORT OF OPINION.

The Supreme Court of Ohio, on March 23rd, 1960, rendered an Opinion which is reported in Volume 170 Ohio State Reports at page 427, wherein four (4) of the seven (7) judges of the Supreme Court of Ohio held that the judgment of the Court of Appeals should be reversed, because the statute under which the defendant-appellant was convicted was unconstitutional. However, Section 2 of Article IV of the Constitution of Ohio reads in part:

> "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of the judgment of the Court of Appeals declaring a law unconstitutional and void."

Since more than one of the judges of the Supreme Court of Ohio were of the opinion that no portion of the Statute upon which defendant's conviction was based was

unconstitutional and void, the judgment of the Court of Appeals affirming the judgment of the Common Pleas Court had to be affirmed. This Opinion is marked Appendix "A," and is attached hereto and made a part hereof.

JURISDICTIONAL GROUNDS.

The Appellant was convicted of the crime that she "unlawfully and knowingly had in her possession and under her control, certain lewd and lascivious books, pictures and photographs, being so indecent and immoral in their nature that the same would be offensive to the Court and improper to be placed on the records thereof" in violation of Section 2905.34, Ohio Revised Code (Appendix "B"), and was sentenced from one (1) to seven (7) years confinement in the Ohio State Womens Reformatory and is presently at large on bail in the sum of Two Thousand Five Hundred Dollars ($2,500.00). The judgment and sentence was appealed to the Court of Appeals, which on the 31st day of March, 1959, affirmed the judgment and sentence of the Common Pleas Court. This ruling was appealed to the Supreme Court of Ohio, which Supreme Court affirmed the decision of the Court of Appeals on March 23rd, 1960, the Opinion being attached to this Brief and made a part hereof and marked Appendix "A." This appeal is taken pursuant to 28 U. S. C. Section 1257 (2).

Final judgment was rendered in the Ohio State Supreme Court affirming the decision of the lower Court on March 23rd, 1960. An Application for Re-Hearing was denied on April 13th, 1960. The Notice of Appeal to this Court was filed in the Supreme Court of Ohio on June 15th, 1960.

Jurisdiction in matters of this kind is conferred upon this Court by 28 U. S. C. Section 1257 (2).

The following cases sustain the position of the defendant-appellant that this Court has jurisdiction to hear this appeal:

Smith v. California (1959), ____ U. S. ____, 4 L. Ed. (2d) 205; 80 S. Ct. 215;
Winters v. New York, 333 U. S. 507;
Roth v. United States, 354 U. S. 476, 1 L. Ed. (2d) 1498; 77 S. Ct. 1304;
Weems v. United States, 217 U. S. 349;
Butler v. Michigan, 352 U. S. 380; 77 S. Ct. 524 (1957);
Frank v. Maryland, 79 S. Ct. 804 (1959);
Roof v. Colorado, 338 U. S. 25; 69 S. Ct. 1359;
Presont v. United States, 281 Fed. 131;
Marisette v. United States, 342 U. S. 246;
State v. Kimbro, 46 S. E. (2d) 273, Syl. 3;
Southwestern Bell Telephone Co. v. Oklahoma, 58 S. Ct. 528;
Demorest v. City Bank Farmers Trust Co., 64 S. Ct. 384;
Hague v. Committee For Industrial Organization, 59 S. Ct. 954.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

We question the validity and constitutionality of Section 2905.34 Ohio Revised Code, which has been printed in Page's Ohio Revised Code, Annotated, Title 29 (1959 Supplement) and which is fully set forth in Appendix "B" attached hereto and made a part hereof, together with the other pertinent portions of the Federal Constitution, the Ohio Constitution and other Ohio Statutes.

QUESTIONS PRESENTED BY THIS APPEAL.

The questions presented by this Appeal are as follows:

(a) Is Section 2905.34 Ohio Revised Code unconstitutional, and particularly, is it unconstitutional when applied to the facts and circumstances of the case at bar under Amendment IV, Amendment V, Amendment XIV Section 1, of the United States Constitution; and Article I Section 1, Article I Section 2, Article I Section 16, Article I Section 19, Article II Section 1, Article II Section 26 of the Ohio Constitution?

(b) Does a sentence of seven (7) years for violation of Section 2905.34 Ohio Revised Code violate Amendment VIII of the United States Constitution and Article I Section 9 of the Ohio Constitution; and is this particularly so under the facts and circumstances of the case at bar?

(c) Did the conduct of the police in procuring the books, papers and pictures placed in evidence by the prosecution violate Amendment IV, Amendment V, and Amendment XIV Section 1, of the United States Constitution; and Article I Section 1, and Article I Section 14, of the Ohio Constitution?

(d) Did the Court of Appeals of Ohio violate Article IV Section 6 of the Ohio Constitution holding that it could not review the sentence of the trial court?

(e) Is a charge by a Court to a jury on presumption, thereby effectively depriving defendant of a trial by a jury and did other charges by the Court to the jury violate Amendment V, Amendment VI, and Amendment XIV Section 1, of the United States Constitution; and Article I Section 5, and Article I Section 10, of the Ohio Constitution?

STATEMENT OF THE CASE.

On the 23rd day of May, 1957, police officers, without the benefit of a search warrant, ostensibly looking for an individual who was wanted in connection with an extortion bombing, forced their way into defendant's private residence, which was the upper portion of a two-family house. Twelve (12) police officers had surrounded the private residence of the defendant where she lived with her 13-year old daughter and forced their way into it. Upon demand of a search warrant, a piece of paper was held before the defendant without giving her an opportunity to view or read same. She was then handcuffed to the banister of the stairway while the search of her private residence was made. This alleged search warrant was never proved or even tendered in the trial court upon request of the defendant. Nor was there any evidence introduced that any search warrant was ever issued.

Thereafter, the police officers, frustrated in their attempt to find any individual involved in an extortion bombing, illegally and in violation of defendant's constitutional rights, searched her private dwelling, and found lewd and lascivious documents belonging to a former roomer. The evidence showed that these documents were found by the defendant while she was cleaning a room which had been vacated by the former roomer. She stored these documents until such a time as the roomer would have returned to claim his property. It was for possession of the *roomer's* documents that the defendant was convicted of violation of Section 2905.34 Ohio Revised Code, and sentenced to from one (1) to seven (7) years in the Ohio State Womens Reformatory. Perversely, under Section 2909.01 Ohio Revised Code, had the defendant de-

stroyed the documents instead of storing them, she would have been liable to a sentence from one (1) to seven (7) years imprisonment. That Section reads in part as follows:

> "No person shall maliciously destroy or injure property not his own.
>
> Whoever violates this section shall be imprisoned not less than one (1) or more than seven (7) years if the value of the property destroyed or the injury done, is One Hundred Dollars ($100.00) or more * * *."

The question of the constitutionality of Section 2905.34 was raised in the Court of Appeals in the "Argument" of the Brief of Defendant-Appellant, and then again in the Supreme Court of Ohio in the "Assignments of Error" and "Questions of Law." The question of the constitutionality of the sentence of seven (7) years for violation of Section 2905.34 was raised in the "Motion For New Trial" in the trial Court and in the Court of Appeals in the "Discussion" and then again in the Supreme Court of Ohio under "Assignments of Error" and "Questions of Law." The matter of the conduct of the police in procuring the evidence was first raised in the trial court on a "Motion To Suppress" filed September 3rd, 1958, then again in the Court of Appeals in the "Statement of Facts," and then again in the Supreme Court of Ohio in the "Assignments of Error" and "Questions of Law." The question of whether or not the Court of Appeals of Ohio violated the Ohio Constitution was raised in the Supreme Court in the "Assignments of Error" and "Questions of Law." The matter of the Court's charge to the jury was raised in the Court of Appeals in the "Discussion" of defendant-appellant's Brief, and again in the Supreme Court in the "Assignments of Error" and "Questions of Law."

The Court of Appeals wrote a brief Journal Entry affirming the lower Court's judgment, which Journal Entry is marked Appendix "C," attached hereto and made a part hereof as if fully rewritten herein. This Journal Entry did not dispose of the individual items with particularity. The Supreme Court of Ohio wrote an Opinion which affirmed the two (2) lower court rulings, but clearly indicated that a majority of the Supreme Court felt that the judgments of the lower courts should be reversed. This Opinion is marked Appendix "A" and attached hereto and made a part hereof as if fully rewritten herein. In the Opinion of the Supreme Court of Ohio, four (4) of the seven (7) judges held that the Statute was unconstitutional, but that by virtue of Section 2 Article IV of the Ohio Constitution, four (4) of the seven (7) judges of the Supreme Court of Ohio were insufficient in number to reverse the judgment on that basis. In a further dissenting opinion written by Justice Herbert, and concurred in by Justice Bell, they indicated that in addition to a reversal on the unconstitutionality of the Statute, the judgment should be reversed by virtue of the unconstitutional and unlawful action of the police officers in obtaining the evidence upon which a conviction was obtained.

The Federal questions raised by this appeal are substantial for the following reasons:

The Ohio Statute under which the defendant was convicted violates one's sacred right to own and hold property, which has been held inviolate by the Federal Constitution. The right of the individual "to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to be a clear infringement of the constitutional

rights of the individual" (Justice Herbert's dissenting Opinion, Appendix "A"). Many convictions have followed that of the defendant in the State Courts of Ohio based upon this very same statute. Unless this Honorable Court hears this matter and determines once and for all that the Statute is unconstitutional as defendant contends, there will be many such appeals. When Sections 2905.34, 2905.37 and 3767.01 of the Ohio Revised Code are read together, which Statutes are set forth in Appendix "B", they obviously contravene the Federal and State constitutional provisions; by being convicted under the Statute involved herein, and in the manner in which she was convicted, Defendant-Appellant has been denied due process of law; a sentence of from one (1) to seven (7) years in a penal institution for alleged violation of this unconstitutional section of the Ohio Revised Code deprives the defendant of her right to liberty and the pursuit of happiness, contrary to the Federal and State constitutional provisions, for circumstances which she herself did not put in motion, and is a cruel and unusual punishment inflicted upon her contrary to the State and Federal Constitutions.

Respectfully submitted,

A. L. KEARNS & WALTER L. GREENE,
Attorneys for Defendant-Appellant.

APPENDIX "A."

OPINION OF THE SUPREME COURT OF OHIO.

Defendant was indicted for "unlawfully and knowingly" having "had in her possession and under her control, certain lewd and lascivious books, pictures and photographs."

This indictment was based upon Section 2905.34, Revised Code, which reads in part:

"No person shall knowingly * * * have in his possession or under his control an obscene, lewd, or lascivious book * * * print, [or] picture * * *

"Whoever violates this section shall be fined not less than $200 nor more than $2,000 or imprisoned not less than one nor more than seven years, or both."

The verdict of the jury found the defendant "guilty of possession of obscene literature as charged in the indictment." Defendant's motion for a new trial was overruled and the Common Pleas Court rendered judgment sentencing defendant to imprisonment in the Ohio Reformatory for Women for an indeterminate period.*

On appeal to the Court of Appeals, that judgment was affirmed.

The cause is now before this court on appeal from the judgment of the Court of Appeals.

TAFT, J. The books and pictures in evidence in the instant case clearly represent, and the undisputed evidence in the record indicates, that defendant knew at the time

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* Section 5143.05, Revised Code, reads in part:

"Courts imposing sentences to the reformatory shall make them general, and not fixed or limited in their duration. The term of imprisonment shall be terminated by the Pardon and Parole Commission * * * but * * * shall not exceed the maximum term, nor be less than the minimum term provided for such felony."

she is charged with having possessed them that they represented lewd and lascivious books and pictures. However, defendant contends that they were not "in [her] possession or under [her] control" within the meaning of the words of Section 2905.34, Revised Code.

Defendant offered evidence to prove that these books and pictures belonged to a man who had rented from her and occupied a room in her home; that, when she learned he was not going to return or use the room for the balance of the last month for which he had rented it, she decided to use the room for herself and to pack up his belongings and store them until he came for them; that, in doing so, she found these lewd and lascivious books and pictures and packed them in a box and one of her suitcases with his other belongings with the purpose of storing them until he came for his belongings; and that she never looked at these books and pictures again before they were seized by the police.

In our opinion, this evidence of defendant establishes that she had these books and pictures "in * * * [her] possession or under * * * [her] control" within the meaning of those words as used in Section 2905.34, Revised Code.

Her evidence clearly discloses that defendant not only took possession and control of the room which she had rented but also of the belongings of her former tenant, including the books and pictures which the undisputed evidence shows that she knew to be lewd and lascivious.

Hence, it follows that, if the portion of Section 2905.34, Revised Code, that was applied in the instant case, is not unconstitutional and void, then, even if we assume that there were errors in the trial court's charge as defendant argues, such errors could not have prejudiced de-

fendant. It becomes necessary therefore to consider whether the constitutional questions raised require a reversal of the judgment under review.

Defendant contends that the due process clause of the 14th Amendment to the Constitution of the United States was violated by her conviction for possession and control of these books and pictures since that conviction was based primarily upon their unlawful seizure from her during an unlawful search of her home.

There is, in the record, considerable doubt as to whether there ever was any warrant for the search of defendant's home. No warrant was offered in evidence, there was no testimony as to who issued any warrant or as to what any warrant contained, and the absence from evidence of any such warrant is not explained or otherwise accounted for in the record. There is nothing in the record tending to prove or from which an inference may be drawn, and no one has even suggested that any warrant that we may assume that there may have been described anything other than policy paraphernalia as things to be searched for. Our statute (Section 2933.24, Revised Code) requires a search warrant to "particularly describe the things to be searched for." See also Section 2905.35, Revised Code. Our Constitution (Section 14 of Article I) specifically forbids the issuance of any such warrant except "upon probable cause, supported by oath or affirmation, particularly describing the place to be searched * * * and things to be seized." (Admittedly therefore there was no warrant authorizing a search of defendant's home for any "lewd, or lascivious book * * * print, [or] picture."

However, this court has held that evidence obtained by an unlawful search and seizure is admissible in a criminal prosecution. *State v. Lindway*, 131 Ohio St., 166.

2 N. E. (2d), 490 (appeal dismissed and certiorari denied, 299 U. S., 506, 81 L. Ed., 375, 57 S. Ct., 36); and the Supreme Court of the United States has held that the Constitution of the United States does not usually prevent a state court from so holding. *Wolf v. Colorado*, 338 U. S., 25, 93 L. Ed., 1782, 69 S. Ct., 1359, *Stefanelli v. Minard*, 342 U. S., 117, 96 L. Ed. 138, 72 S. Ct., 118. Subsequently, in *Rochin v. California*, 342 U. S., 165, 96 L. Ed., 183, 72 S. Ct., 205, 25 A. L. R. (2d), 1396, that court held that a conviction, obtained primarily by introducing in evidence narcotics seized not only during an illegal search but by means of a physical assault upon the defendant, violated the due process clause. Although there are statements in the majority opinion in that case which will support a reasonable argument that the conviction in the instant case should be set aside because the "methods" employed to abtain the books and pictures were such as to "offend 'a sense of justice,' " later decisions have refused to follow that case in instances not involving the acquisition of incriminating evidence by the use of " 'brutal' or 'offensive' " physical force against the person of the defendant. *Breithaupt v. Abram, Warden*, 352 U. S., 432, 1 L. Ed., (2d), 448, 77 S. Ct., 408. See also *Irvine v. California*, 347 U. S., 128, 98 L. Ed., 561, 74 S. Ct., 381 (evidence obtained by use of microphone illegally placed in defendant's home). Annotations 93 L. Ed., 1797, 96 L. Ed., 145, 98 L. Ed., 581, 100 L. Ed., 239, 50 A. L. R. (2d), 531. There is no evidence that any of the incriminating evidence in the instant case was taken from defendant's person by the use of brutal or offensive physical force against defendant.

Hence, we conclude that, if the portion of Section 2905.34, Revised Code, applied in the instant case is valid, the due process clause of the 14th Amendment to the Con-

stitution of the United States was not violated by defendant's conviction, although that conviction was based primarily upon the introduction in evidence of books and pictures unlawfully seized during an unlawful search of defendant's home.

The constitutionality of the regulation of obscene literature is considered in a recent annotation in 1 L. Ed. (2d), 2211. That annotation does not indicate that there is any case decided by court of last resort, and we can find none, considering the validity of a legislative prohibition against a mere knowing possession of lewd books and pictures. In most instances of legislation prohibiting possession of such articles, possession is prohibited, as it was under Section 2905.34, Revised Code (formerly Section 13035, General Code), prior to its amendment in 1939, where such possession is for the purpose of sale, lending, giving away, exhibiting or publishing. Under our statute as now worded, mere possession is forbidden even where the possessor does not have a purpose of again looking at the books or pictures; and, in the instant case, the jury could have found the defendant guilty and she could have been (as she was) sentenced as a felon, even though it believed her evidence that she had innocently acquired possession of these articles, had no intention of ever looking at them again and was merely keeping them pending instructions for their disposition from their owner. *Cf. Lambert v. California*, 355 U. S., 225, 2 L. Ed. (2d), 228, 78 S. Ct., 240, *Weems v. United States*, 217 U. S., 349, 54 L. Ed., 793, 30 S. Ct., 544.

If, as defendant's evidence discloses, defendant took possession and control of these books and pictures when she took possession of the room that had been occupied by her tenant and endeavored to pack up his things for him

and, while doing that, necessarily learned of their lewd and lascivious character, then at that instant she had "in" her "possession" and "under" her "control" a "lewd or lascivious book * * * print [or] picture" as prohibited by this statute.

If such a legislative prohibition of possession of books and papers is valid, it may discourage law abiding people from even looking at books and pictures and thus interfere with the freedom of speech and press guaranteed by Articles I and XIV of the Amendments to the Constitution of the United States.

Smith v. California (1959), __ U. S., __, 4 L. Ed. (2d), 205, 80 S. Ct., 215, held invalid a legislative provision that made it "unlawful for any person to have in his possession any obscene or indecent writing, [or] book * * * in any place of business where * * * books * * * are sold or kept for sale."

In the court's opinion by Mr. Justice Brennan it is said:

"We have held that obscene speech and writings are not protected by the constitutional guarantees of freedom of speech and the press. *Roth v. United States*, 354 U. S., 476, 1 L. Ed. (2d), 1498,77 S. Ct., 1304. * * * our holding in *Roth* does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold. * * * if the bookseller is criminally liable without knowledge of the contents, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the state will have imposed a restriction upon the distribution

of constitutionally protected as well as obscene literature. * * * the bookseller's burden would become the public's burden, for by restricting him the public's access to reading matter would be restricted. If the contents of bookshops and periodical stands were restricted to material of which their proprietors had made an inspection, they might be depleted indeed. The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the state could not constitutionally suppress directly. The bookseller's self-censorship, compelled by the state, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded."

It may be argued that the legislation involved in the instant case, unlike that involved in the *Smith* case, requires *scienter* because it only makes it unlawful to "*knowingly* * * * have * * * possession." However, this legislation is analogous in its effect to that in the *Smith* case. If anyone looks at a book and finds it lewd, he is forthwith, under this legislation, guilty of a serious crime, which may involve a sentence to the penitentiary similar to the one given to this defendant. As a result, some who might otherwise read books that are not obscene may well be discouraged from doing so and their free circulation and use will be impeded. Cf. *Benjamin v. City of Columbus*, 167 Ohio St., 103, 146 N. E. (2d), 854, where no question of freedom of press involved.

In the opinion of Judges Taft, Bell, Herbert and Peck, the portion of Section 2905.34, Revised Code, upon which

defendant's conviction was based, is constitutionally invalid, and, for that reason, the judgment of the Court of Appeals should be reversed. However, Section 2 of Article IV of the Constitution of Ohio reads in part:

"No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of the judgment of the Court of Appeals declaring a law unconstitutional and void."

Since more than one of the judges of this court are of the opinion that no portion of the statute upon which defendant's conviction was based is unconstitutional and void, the judgment of the Court of Appeals must be affirmed.

Judgment affirmed.

ZIMMERMAN and PECK, JJ., concur.

MATTHIAS, J., concurs in paragraphs two and three of the syllabus and in the judgment.

WEYGANDT, C. J., concurs in the judgment.

BELL and HERBERT, JJ., concur in paragraphs one and three of the syllabus but dissent from paragraph two thereof and from the judgment.

HERBERT, J., dissenting. Although I concur in paragraphs one and three of the syllabus, I must dissent from paragraph two which follows *State v. Lindway*, 131 Ohio St., 166, 2 N. E. (2d), 490, and the judgment. The facts are sufficiently stated in the majority opinion.

Section 14, Article I of the Ohio Constitution, provides:

"The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable

searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person and things to be seized."

The judgment in the *Lindway* case is not in conflict with this constitutional provision. Had I been a member of this court at that time I would have joined in the judgment as all the members of the court then did because the evidence there clearly established that the defendant was operating a bomb manufacturing shop in the basement of that house.

As stated by Jones, *J.*, in the concurring opinion in that case:

"This defendant was suspected of manufacturing bombs and of being engaged in the nighttime bombing of the homes of employees of a manufacturing company. If the search produced evidence of his projected crime, the evidence should have been admitted; for neither Constitution nor state law was intended to provide security for such dangerous enemies to our public peace."

The foregoing sentence contains ample legal foundation and justification for the judgment affirming the conviction there. As to that portion of the syllabus, however, relating to evidence obtained by an unlawful search—in which only a bare majority concurred—it seems to me to be far too comprehensive and susceptible to abuse by police and prosecution authorities. As a rule, abuses by such officials rarely occur but when they do the constitutional rights of the private citizen should be fully protected. The broad scope of the rule relating to evidence obtained by an unlawful search, as stated in the *Lindway* syllabus, leads me to the inescapable conclusion that in too many instances

it virtually sterilizes the constitutional guarantees provided by Section 14, Article I.

On the basis of the constitutionality of Section 2905.34, Revised Code, which is fully discussed and disposed of in the majority opinion, this case seems to me to afford a perfect opportunity for the court to modify and limit the *Lindway* rule in the direction indicated by Jones, J., so as to bring it into accord with a more reasonable interpretation of the above-quoted provision of the Constitution and the requirements of the statutes enacted to implement it.

Section 13035, General Code (now Section 2905.34, Revised Code), provided, from 1910 to 1939, as follows:

"Whoever sells, lends, gives away, exhibits, or offers to sell, lend, give away or exhibit, or publishes or offers to publish or has in his possession *for such purpose*, an obscene, lewd or lascivious book * * *." (Emphasis added.)

In fact, the emphasized words read "for any such purpose" from 1894 until 1910.

In 118 Ohio Laws, 420 (1939), the emphasized words were stricken and the words, "or has under his control," were inserted in their place.

In 120 Ohio Laws, 230 (1943), the word, "knowingly," was inserted after the opening word, "whoever." In the same act, Section 13035-1, General Code (now Section 2905.35, Revised Code), was passed, providing for the issuance of search warrants for suspected violation of the preceding section and also providing for the disposition of articles seized under such warrants. The last sentence of this search-warrant statute now reads:

"The magistrate shall immediately transmit every article seized by virtue of the warrant, to the prosecuting attorney, who shall, upon conviction of the person from

whose possession the same was taken, cause it to be destroyed, and the fact of such destruction to be entered upon the records of the court in which the conviction is had."

Ironically enough, there being no evidence of the issuance of a search warrant for obscene books, the provisions of this last sentence are not applicable to the disposition of the evidence in the instant case.

In addition to the specific provisions of Section 2905.35, Revised Code, Section 2933.21, Revised Code, provides:

"A judge of a court or a magistrate may, within his jurisdiction, issue warrants to search a house or place:

"* * *

"(D) For books, pamphlets, ballads, or printed papers containing obscene language, prints, pictures * * * and for obscene, lewd, indecent, or lascivious drawings, lithographs, engravings, pictures * * *."

This provision has been in substantially the same form since 1876.

In the light of the *Lindway* rule and the decision in this case, one may well ask why the Legislature in 1943 enacted Section 13035-1, General Code (now Section 2905.35, Revised Code), particularly in view of the fact that Section 2933.21 (D), Revised Code, has for many years provided for search warrants in such cases.

Under the principle stated by Jones, J., in his concurring opinion in *Lindway*, a conviction could well be sustained in this case if books had been discovered in the home of defendant in quantities indicating a purpose to sell, lend, give away, exhibit or offer to do so (see "for such purpose," *supra*), but on the facts here it seems to the writer that the constitutional right of this defendant "to

be secure * * * against unreasonable searches and seizures" was violated.

It is a basic principle that laws restraining the fundamental liberties of the individual must have as their foundation a broad basic public need which overshadows the rights of the individual. While we agree that the dissemination of obscene literature such as that produced in evidence in the present case is and should be against public morals and policy if for no other reason than that the immature mind which might be exposed to it could be greatly harmed, I cannot agree that mere private possession of such literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his constitutional rights as an individual. Does the state have the power to prohibit the possession of chemistry books because from such books one might learn how to make a bomb or poisonous gas? Is the possession of medical books by a layman to be banned because of the possibility that he might learn about abortion and perhaps put such knowledge to use?

The foregoing paragraph is perhaps more applicable to a discussion of the constitutionality of Section 2509.34, Revised Code, than to the issue on which I dissent, but, since under another provision of the Constitution a bare majority of this Court is powerless to invalidate the portion of that section under which the defendant was convicted, we certainly should scan carefully the method by which the evidence was acquired for such conviction. I would hold no brief for the defendant here if the evidence had disclosed a commercial purpose in the possession of these books. Had there been found printing presses with evidence of

their criminal use or a sufficient volume of books to indicate the purpose of distribution, commercial or otherwise, we might well hold that the privacy and constitutional immunity of defendant's home from unlawful search and seizure had been lost by her own conduct (as in the *Lindway* case where a bomb factory was discovered), but on the undisputed facts, as disclosed in this record, I cannot so conclude. See, also, paragraph two of the syllabus in *Ciano v. State,* 105 Ohio St., 229, 137 N. E., 11.

As disclosed in 50 *A. L. R.* (2d), 531, the states are now about evenly divided between the extremes of the so-called federal rule on search and seizure and the rule as stated in *Lindway,* indicating a trend away from the *Lindway* rule since the time of its decision.

A violator of Section 2905.34, Revised Code, may, upon conviction, be either fined, jailed or sent to the penitentiary.

As Jones, *J.,* stated in his concurrence in the *Lindway* case: "It is not for the class of criminal element alluded to, but for the class embodying millions of citizens who are innocent of any offense or whose offenses are minor, that I urge protection under the search and seizure clause of the state Constitution. The decision of this Court in the instant case is too broad, since it is made to apply to everyone suspected of committing any offense whatever. There is one advantage the occupant of a bona fide dwelling now has and always has had—he could discover whether a search warrant had in fact been issued and for, his own protection, could demand its production."

Here, the defendant did just that and the evidence is uncontradicted that she was not given an opportunity to read it, if any was issued. In fact, it was not even contended by the prosecution that a warrant was ever issued authorizing a search of her home for obscene literature. In

my view, the *Lindway* rule which is being followed in this case should be modified and clarified so that there will no longer be a judicial stamp of approval on the use of unlawful means to justify an end result. Here an admittedly private home was unlawfully searched, and I cannot concur in a judgment upholding conviction based solely on evidence so obtained.

BELL, *J.*, concurs in the foregoing dissenting opinion.

APPENDIX "B."

Pertinent Portions of United States Constitution.

AMENDMENT IV.

"SEARCHES AND SEIZURES.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT V.

"RIGHTS OF PERSONS.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT VI.

"RIGHTS OF ACCUSED.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

AMENDMENT VIII.

"PUNISHMENT FOR CRIME.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

AMENDMENT XIV SECTION 1.

"RIGHTS OF CITIZENS.

Sec. 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Pertinent Portions of Ohio Constitution.

ARTICLE I SECTION 1.

"RIGHT TO FREEDOM AND PROTECTION OF PROPERTY.

All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety."

ARTICLE I SECTION 2.

"RIGHT TO ALTER, REFORM, OR ABOLISH GOVERNMENT, AND REPEAL SPECIAL PRIVILEGES.

All political power is inherent in the people. Government is instituted for their equal protection and benefit. * * *"

ARTICLE I SECTION 5.

"TRIAL BY JURY; REFORM IN CIVIL JURY SYSTEM.

The right of trial by jury shall be inviolate * * *."

ARTICLE I SECTION 9.

"BAILABLE OFFENSES; OF BAIL, FINE, AND PUNISHMENT.

All persons shall be bailable by sufficient sureties, except for capital offenses where the proof is evident or the presumption great. Excessive bail shall not be required; *nor excessive fines imposed; nor cruel and unusual punishments inflicted.*"

ARTICLE I SECTION 10.

"TRIAL OF ACCUSED PERSONS AND THEIR RIGHTS; DEPOSITIONS BY STATE AND COMMENT ON FAILURE OF ACCUSED TO TESTIFY IN CRIMINAL CASES.

Except in cases of impeachment, cases arising in the army and navy, or in the militia when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the

number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial *by an impartial jury* * * *."

ARTICLE I SECTION 14.

"SEARCH WARRANTS AND GENERAL WARRANTS.

The right of the people to be secure in their persons, houses, papers, and possessions, against unreasonable searches and seizures shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized."

ARTICLE I SECTION 19.

"INVIOLABILITY OF PRIVATE PROPERTY.

Private property shall ever be held inviolate * * *."

ARTICLE II SECTION 1.

"IN WHOM LEGISLATIVE POWER IS VESTED.

The legislative power of the state shall be vested in a general assembly * * *."

ARTICLE II SECTION 26.

"WHAT LAWS TO HAVE A UNIFORM OPERATION.

All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general

assembly, except, as otherwise provided in this constitution."

OF ARTICLE IV SECTION 2.

"THE SUPREME COURT.

* * * No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void * * *."

ARTICLE IV SECTION 6.

"COURTS OF APPEALS.

* * * The court of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and such jurisdiction as may be provided by law to review, affirm, modify, set aside, or reverse judgments or final orders of boards, commissions, officers, or tribunals, and of courts of record inferior to the court of appeals within the district * * *."

Pertinent Statutes of the State of Ohio.

Section 2905.34 (13035) Selling, exhibiting and possessing obscene literature or drugs, for criminal purposes.

No person shall knowingly sell, lend, give away, exhibit, or offer to sell, lend, give away, or exhibit, or publish or offer to publish or have in his possession or under his control an obscene, lewd, or lascivious book, magazine, pamphlet, paper, writing, advertisement, circular, print, picture, photograph, motion picture film, or book, pamphlet, paper, magazine not wholly obscene but containing lewd or lascivious articles, advertisements, photographs, or drawings, representation, figure, image, cast, instrument, or articles of an indecent or immoral nature, or a

drug, medicine, article, or thing intended for the prevention of conception or for causing an abortion, or advertise any of them for sale, or write, print, or cause to be written or printed a card, book, pamphlet, advertisement, or notice giving information when, where, how, of whom, or by what means any of such articles or things can be purchased or obtained, or manufacture, draw, print, or make such articles or things, or sell, give away, or show to a minor, a book, pamphlet, magazine, newspaper, story paper, or other paper devoted to the publication, or principally made up, of criminal news, police reports, or accounts of criminal deeds, or pictures and stories of immoral deeds, lust or crime, or exhibit upon a street or highway or in a place which may be within the view of a minor, any of such books, papers, magazines, or pictures.

Whoever violates this section shall be fined not less than two hundred nor more than two thousand dollars or imprisoned not more than seven years, or both.

Section 2905.36 (13036) Sending obscene literature by mail.

No person shall deposit in a post office, or place in charge of a person to be carried or conveyed, any of the obscene, lewd, indecent or lascivious articles or things named in Section 2905.34 of the Revised Code, or a circular, handbill, card, advertisement, book, pamphlet, or notice of the kind specified in said section, or give oral information, where, how or of whom such obscene, lewd, indecent, or lascivious articles or things can be purchased or obtained or knowingly receive any of them with intent to carry or convey, or knowingly carry or convey them, except in the United States mail.

Whoever violates this section shall be fined not less than fifty nor more than one thousand dollars or imprisoned not more than one year, or both.

2905.37 (13037) LEGITIMATE PUBLICATIONS NOT OBSCENE.

Sections 2905.33 to 2905.36, inclusive, of the Revised Code do not affect teaching in regularly chartered medical colleges, the publication of standard medical books, or regular practitioners of medicine or druggists in their legitimate business, nor do they affect the publication and distribution of bona fide works of art. No articles specified in Sections 2905.33, 2905.34, and 2905.36 of the Revised Code shall be considered a work of art unless such article is made, published, and distributed by a bona fide association of artists or an association for the advancement of art whose demonstrated purpose does not contravene Sections 2905.06 to 2905.44, inclusive, of the Revised Code, and which is not organized for profit.

Section 2905.38 (13038) Delivering or depositing immoral literature.

No person shall leave or place or cause to be left or placed upon the doorstep or premises owned or occupied by another, or deliver or mail to a child under sixteen years of age, printed or written matter advertising or mentioning therein a drug, nostrum, receipt, or method of treatment for venereal diseases or referring to a method of treatment purporting to restore procreative organs injured by immoral practices.

Whoever violates this section shall be fined not less than twenty-five nor more than one hundred dollars or

imprisoned not less than thirty nor more than one hundred days, or both, for each offense.

Section 2905.39 (13039) Printing or posting immoral pictures.

No person shall make or print in or upon his premises, or post, publish, or exhibit in or upon a building, billboard, bridge, or fence where it can be publicly seen, a picture or figure that is lascivious, indecent, immoral, or impure, or which represents crime or lust, or tends to corrupt morals, or permit such an act to be done by another in or upon his premises, building, billboard, bridge, or fence.

Whoever violates this section shall be fined not less than fifty nor more than five hundred dollars for a first offense; for each subsequent offense, in addition to such fine, such person shall be imprisoned not less than thirty days nor more than six months.

This section does not apply to the printing and publication in book or magazine form of illustrations for scientific purposes.

Section 2909.01.

No person shall maliciously destroy or injure property not his own.

Whoever violates this section shall be imprisoned not less than one or more than seven years if the value of the property destroyed, or the injury done, is one hundred dollars or more * * *.

Section 3767.01 (C), Ohio Revised Code.

This section and Sections 2905.34, * * * 2905.37 * * * of the Revised Code shall not affect * * * any newspaper, magazine, or other publication entered as second class matter by the post-office department.

APPENDIX "C."

JOURNAL ENTRY OF THE COURT OF APPEALS.

Dated: March 31, 1959

This cause came on to be heard on the appeal on questions of law from the judgment of the Court of Common Pleas, and was argued by counsel for the parties. Defendant found guilty of violation of Section 2905.34 R. C. by the jury upon which judgment was entered. Defendant complains particularly of error in charge and complains of sentence imposed. Upon review of the entire case, we find no error prejudicial to the rights of the defendant. (Section 2945.83 R. C.) The question of punishment is within the exclusive jurisdiction of the trial court. The judgment of the Court of Common Pleas is therefore affirmed.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. Appellant excepts.

APPENDIX "D."

ORDER OF THE SUPREME COURT OF THE STATE OF OHIO.

(March 23, 1960.)

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended taxed at $ _____.

ORDERED, That a special mandate be sent to the Court of Common Pleas of Cuyahoga County, to carry this Judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals, of Cuyahoga County, "for entry."